IN THE

Supreme Court of the United States

October Term, 1974

No. 73-1004

SOUTHEASTERN PROMOTIONS, LTD.,

Petitioner,

v.

STEVE CONRAD, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MOTION OF CHARLES H. KEATING, JR., FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF RESPONDENT WITH BRIEF ANNEXED

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MISCELLANEOUS

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Charles H. Keating, Jr., (hereinafter referred to as Moving Party) respectfully moves, pursuant to Rule 42(2) of the Rules of the U. S. Supreme Court, for leave to file a tardy Brief Amicus Curiae in support of the Respondents, Steve Conrad, et al.

Moving Party has a special interest in the subject matter of this appeal, having devoted considerable time, study and effort to assisting law enforcement in combating the spread

counsel for Citizens for Decent Literature, Inc. (now Citizens for Decency Through Law) and more recently as a member of the Presidential Commission on Obscenity and Pornography.

The importance of this case lies in the fact that this Court has been presented with an opportunity to come to grips with the issue of whether, in applying *prospective civil sanctions* to lewd *conduct* (not pure speech) on films or in a stage play, the government is restricted to applying the formulistic test fashioned by this Court in *Miller v. California*, 413 U.S. 15, 37 L.Ed.2d, 419, 93 S. Ct. 207 (June 21, 1973) – a test which was arrived at in the background of arguments which focused on the application of *criminal* sanctions for *past* conduct. In a Brief Amicus Curiae filed with this Court last term in *Jenkins v. Georgia*, No. 73-557, (which reviewed criminal, rather than civil, sanctions) Moving Party argued that a state's power to apply *civil* sanctions *prospectively* to lewd *conduct* on films or in stage plays is not so limited. See Brief Amicus Curiae of C. H. Keating, Jr., in Support of Appellee in *Jenkins v. Georgia*, No. 73-557, at pp. 33-39, a copy of which appears at Appendix "A" to the Brief herein.

Moving Party urges this Court to permit Federal District Judge Frank W. Wilson's opinion and judgment herein to function as a vehicle for formulating a rule of constitutional law which will permit state legislators, law enforcement personnel, and the judiciary to enact and enforce *civil* statutes, city ordinances and judicial decisions which *enjoin prospectively*, as *malum in se*, the public display of explicit sexual conduct (including public nudity) on the stage and motion picture screen, and without reference to the "taken as a whole" test, fashioned by this Court in *Miller v. California, supra*, upon the condition enunciated by Judge Wilson; that is, whenever it is shown as a condition precedent to the application of such "conduct" laws in specific cases that the four conditions stated in *U.S. v. O'Brien*, 391 U.S. 367, 20 L.Ed.2d 672, 88 S.Ct. 1673, (May 27, 1968) are satisfied, namely:

(1) The statute or ordinance is within the Constitutional Power of Government;

(2) The statute or ordinance furthers an important interest;
(3) The governmental interest which is being furthered by the statute is unrelated to the suppression of free speech, and
(4) The incidental restriction must be no greater than is essential to the furtherance of that governmental interest.

Under this view of the law, Respondents, Conrad et al., acted lawfully in refusing use of the City facilities: (1) The ordinance and statutes forbidding public nudity and lewd conduct are clearly within the City's police power; (2) such ordinances and statutes were in furtherance of the historical common law right of a local community to prevent the unlawful exhibition of the sexual organs and the sex act in public; (3) the City's refusal was in no way related to the suppression of "Hair" as a vehicle for speech, and (4) the refusal permitted the same to be shown elsewhere and it was not unreasonable to expect that City property could be used, provided the unlawful sexual displays were omitted. See *P.B.I.C. Inc. et. al. v. Dist. Atty. of Suffolk County* 258 NE2, 82 (April 9, 1970)

Moving Party further urges this Court to require that, in in attempting to state a federal cause of action under 42 U.S.C., Section 1983 in such cases,[1] the complainant must allege affirmatively both: (1) the fact that the prosecutor threatens to apply the lewd conduct statute independently and in derogation of the "taken as a whole" test established in *Miller v. California, supra,* and also (2) the specific facts which preclude the prosecutor from applying the law expressed in *U.S. v. O'Brien, supra.* Having failed in this regard, the trial court should have granted a dismissal of the case on the grounds of failure to state a claim upon which relief can be granted.

Moving Party submits that a recognition of this differentiation between *criminal sanctions* for *past conduct*, and *civil*

[1] Assuming that in such a cause as the matter herein, a federal cause of action may be stated under 42 U.S.C. Sec. 1983 for action taken "under color of state law", without also pleading "racial bias or invidious discriminatory animus." See page 35, infra.

sanctions which operate *prospectively*, is indispensible to a resolution of the basic problem which underlies this action, and arguments thereon will be of assistance to the members of this Court. Accordingly, Moving Party respectfully requests permission to file the Brief Amicus Curiae annexed hereto, which presents such arguments in the context of the historical facts of this case.

Dated: October 16, 1974.

Charles H. Keating, Jr.
Amicus Curiae

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BRIEF AMICUS CURIAE OF CHARLES H. KEATING, JR. IN SUPPORT OF RESPONDENT

JURISDICTION

The jurisdiction of the United States District Court is predicated upon Title 42 U.S.C. section 1983. The jurisdiction of the Supreme Court to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit is conferred by Title 28 U.S.C. section 1254.

QUESTIONS PRESENTED

Amicus Curiae would urge this Court to consider the following Question on review, as being a "subsidiary question fairly comprised" within the questions presented in the original petition for certiorari. Rule 23(1)(c) of the Rules of the United States.

1. Whether the Common Law Power of Local Municipal Governments To Declare What Constitutes "Lewd Conduct In Public", And To Abate The Same (Reserved To The People By The Ninth and Tenth Amendment As A "Municipal Affair") Became Subservient To The First Amendment After Adoption of The Fourteenth Amendment in 1868.

Statement of the Case

A. Introduction.

As averred by Petitioner Southeastern Promotions, Ltd., the stageplay "Hair" is a well-known production, having commenced its run off Broadway in New York City in early 1968. (Appendix p.10) In point of time reference, this Court had just handed down a series of no-clear majority reversals in *Redrup v. New York et al.*, 386 U.S. 767, 18 L.Ed.2d 515, 87 S.Ct. 1414 (May 8, 1967). Those decisions catapulted the three-stage no-clear majority test in *Memoirs v. Massachusetts*, 383 U.S. 413, 16 L.Ed.2d 1, 86 S.Ct. 975 (Mar. 21, 1966) into national prominence and threw the legal advisors to law enforcement into a quandary. They reasoned thusly: How could one establish that anything, much less "Hair", was utterly without redeeming social importance, when taken as a whole?[2] Cf. *Miller v. Calif.*, 413 U.S. 15, 37 L.Ed.2d 419,

[2]The lewd conduct which was interwoven into "Hair" in 1967 was the direct result of this Court's decisions in Memoirs v. Massachusetts, supra (Mar. 21, 1966) and Redrup v. N.Y., supra (May 8, 1967). Those decisions have made the "temptation to substitute the latter commodity (vulgarity, nudity and obscenity) for the former talents (musical,

429 fn.3, 93 S.Ct. 207 (June 21, 1974.) In the shadow of this utter confusion, "Hair" marched across the U.S. from New York to San Francisco, Los Angeles, Chicago, Las Vegas and a host of other cities without opposition. The only serious legal challenge in this advance was made in Boston, Massachusetts by Garrett Byrne, the District Attorney of Suffolk County. The Suffolk County District Attorney's determined legal attack was doomed at the outset by the fractured condition of this Court and the refusal of a majority of its members to come to grip with this modern challenge to public morals.

B. The Massachusetts "Hair" Litigation - Three Years On This Court's Docket Without Decision.

To view the appeal herein in its proper perspective, and understand the dilemma which faced the Respondent Board of the City of Chattanooga, this Court must refresh its recollection as to the nature of the Massachusetts litigation and the four years of frustrating federal interference in which District Attorney Byrne found himself involved, in a similar case in Boston, Massachusetts, notwithstanding a prompt resolution of the "Hair" problem in his favor by the highest court in his own state. The facts of the Massachusetts case, which appear below, are documented in the April 9, 1970 opinion of the Supreme Judicial Court of Massachusetts in *P.B.I.C., Inc. v. District Attorney of Suffolk County*, 258 N.E. 2d 82, a copy of which appears at Appendix B to this Brief. See also the case as reported in the Appendix to *P.B.I.C., Inc. v. Byrne*, 313 F.Supp. 775 at 768.

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literary, and dramatic ability) well-nigh irresistible in the entertainment world in recent years." (See Trial Judge Wilson's opinion in 341 F.Supp. 465, at 477.) Unless this Court does something positive to correct this erroneous impression, the temptation to "combine talent with vulgarity, nudity and obscenity to come up with a box office hit" will continue unabated.

1. The "Solomonic" Decision of The Supreme Judicial Court of Massachusetts.

On Feb. 22, 1970, "Hair" opened at the Wilbur Theater in Boston. A few days later, the District Attorney of Suffolk County gave notice that the performers and the producers would be prosecuted under Sections 16 and 32 of Chapter 272 of the Massachusetts General Laws, (which made it a crime to be guilty of "open and gross lewdness and lascivious behaviour" and to "participate in any lewd, obscene . . . show or entertainment,") if they failed to remove from the play certain lewd conduct. The producers of "Hair" immediately sought injunctive and declaratory relief from a single justice of the Massachusetts Supreme Judicial Court. Thereafter, evidence was taken and the case was reserved to the full court. After each participating justice had observed the Boston production as a member of the regular nightly audience, the Court unanimously held in *P.B.I.C. Inc. Byrne, supra:*

> "One scene shows members of the cast in the nude facing the audience. One nude male performer is bathed on stage. There is incidental stage action which a jury could conclude was clowning intended to simulate sexual intercourse or deviation . . . . The incidents, already mentioned are separable from, and wholly unnecessary to, whatever theme this noisy, disorganized performance may have . . . . Injunctive relief will be given, but by analogy to the principle that he who seeks equity must do equity, the injunction, to be framed in the county court, shall be conditional upon excision forthwith of the specified lewd features so as:
>
> > (a) to have each member of the cast clothed to a reasonable extent at all times, and (b) to eliminate completely all simulation of sexual intercourse or deviation. Nothing in this opinion or any injunction is to preclude prosecution for any misuse of the national flag, a matter not argued to us . . . ." (313 F. Supp. 768).

Following this decision by the Highest Court in Massach-

usetts, District Attorney Byrne indicated he would prosecute under section 16 and the common law of indecent exposure if the cast did not comply with the Massachusetts' High Court's conditions. On April 10, 1970, the cast and producers chose to close the show rather than make the modifications indicated by the Court's opinion or risk criminal prosecution by continuing to present the production without modification. Three days later the producers of the play filed an action in the federal district court seeking relief under the Civil Rights Act of 1871 (42 U.S.C. section 1983).

2. "Hair" 's use of a three-Judge Federal District Court in Massachusetts to upset the Solomonic Solution of Massachusetts' Highest Court.

In *P.B.I.C. Inc. v. Byrne*, 313 F. Supp. 757 (May 6, 1970), a three-judge federal district Court in the district of Massachusetts (Justices Coffin and Bownes, with Garrity dissenting) granted the relief requested and enjoined the District Attorney from prosecuting "Hair" under either section 16 or the Common law of indecent exposure. In its ruling, the federal district held at p. 763:

> "We conclude that this same 'obscenity' standard also applies to the regulation of live theater productions . . ."

and at page 765:

> "We conclude that Massachusetts' 'lewd and lascivious' proscription cannot be given a constitutionally permissible interpretation in the live theater context while retaining its much broader proscription for non-speech forms of lewd conduct, without running afoul of the constitutional requirement that limitations on speech related activities must be narrowly drawn so as not to chill legitimate expression. *Zwickler v. Koota*, 389 U.S. 241, 250, 88 S.Ct. 391, 19 L.Ed. 2d 414, (1967) and cases cited . . ."

3. The Indecision of This Court - The Massachusetts "Hair" Litigation Was On This Court's Docket For Three Years Without Decision.

On May 6, 1970, Suffolk County District Attorney Byrne sought a stay of execution in this Court which was granted and, on May 14th, the stay was extended through May 22, 1970. *Garrett H. Byrne v. P.B.I.C. Inc. et al.*, 397 U.S. 1082, 26 L.Ed.2d 59, 90 S.Ct. 1684 (May 14, 1970.) On May 22, 1970, the application for a stay was denied by an equally divided Court with Justices Burger, Black, Harlan, and Stewart voting to grant the stay, and Justices Douglas, Brennan, Marshall, and White voting to deny the stay. *Garrett H. Byrne v. P.B.I.C. Inc. et al.*, 398 U.S. 916, 26 L.Ed.2d 82, 90 S.Ct. 1718 (May 22, 1970.)

On Aug. 1, 1970, Massachusetts Attorney General Quinn filed a direct appeal with this Court from the judgment of the three-Judge Federal District Court in *Byrne v. P.B.I.C., Inc.*, October Term 1970, No. 484. On March 29, 1971, following its decisions on federal interference in *Younger v. Harris et al.*, 401 U.S. 37, 27 L.Ed.2d 669, 91 S.Ct. 746 (Feb. 23, 1971), this Court vacated the judgment of the three-Judge Federal District Court and remanded the case of the United States District Court for the District of Massachusetts to consider the question of mootness. *Byrne v. P.B.I.C., Inc.* 401 U.S. 987, 28 L.Ed.2d 526, 91 S.Ct. 1222 (March 29, 1971.)

This Court's remand on March 29, 1971, did not end the determination of the Attorney General of Massachusetts to seek a resolution of this basic legal question. On Aug. 30, 1971, the same case reappeared on the U.S. Supreme Court docket with the filing of a second appeal in *Byrne v. P.B.I.C., Inc.*, Oct. Term 1971, No. 71-304. That case was to remain unresolved on this Court's docket for almost two years. Finally, on June 25, 1973, following this Court's decisions in *Miller v. California et al.*, 413 U.S. 15, 37 L.Ed.2d 419, 93 S.Ct. 2607, the federal district court judgment was again vacated and remanded to the United States District Court for the District of Massachusetts for further reconsideration in light of *Miller v. California! Garrett H. Byrne v. P.B.I.C. Inc. et al.*, 413 U.S. 905, 37 L.Ed.2d 1017, 93 S.Ct. 3031 (June 25, 1973.)

C. "Hair" 's Use of the Federal Courts in the South To Compel The Use of Municipal Facilities.

During the years 1970 through 1972, the road companies of "Hair" sought to play in various cities throughout the South. It was the pattern of the producers to demand use of the municipal facilities and, upon their denial, immediately seek a preliminary show cause hearing in the federal district court, at which they would seek immediate relief and the use of the facilities on the dates desired. *In none of these cases did they ask the state courts for relief.* Southeastern Promotions Ltd. v. City of Charlotte, N.C. 333 F.Supp. 345 (Nov. 8, 1971); *Southeastern Promotions Ltd. v. Atlanta*, 334 F. Supp. 634 (Nov. 8, 1971); *Southeastern Promotions Ltd. v. City of Birmingham* (D.C.N.Ala.) CA No. 71-1158; *Southwest Productions Inc. v. Freeman* (D.C.Ark. 1971) (Little Rock, Ark.). This strategy had the dual result of publicizing their production for them in local newspapers as well as severely restricting the time and manner local municipal attorneys had to prepare their cases. On those occasions where the local governments were successful in the district courts, appeals were immediately taken and expedited hearings sought and granted in the appellate courts. *Southeastern Promotions Ltd. v. Mobile, Alabama*, 457 F.2d 340 (5th Cir.) (Feb. 28, 1972); *Southeastern Promotions Ltd. v. City of West Palm Beach*, 457 F.2d 1016 (5th Cir.) (Mar. 22, 1972); *Southeastern Promotions Ltd. v. Oklahoma City, Oklahoma*, 459 F.2d 282 (10th Cir.) (April 13, 1972.)

STATEMENT OF FACTS

A. City Refuses to Book "Hair" in Chattanooga Municipal Facilities.

The Board of Directors of the Memorial Auditorium were contacted by an agent of the petitioner on September 11, 1970 with the request of the petitioner to present the musical stage play "Hair" in the Tivoli Theatre at some subsequent time and said request was denied by the members of

the Board. On April 2, 1971, an agent of the petitioner again contacted the members of the aforesaid Board to present the aforesaid musical stage play in the Tivoli Theatre and said Board once again rejected petitioner's request. On October 29, 1971, at the regular monthly meeting of the Board of Directors of Memorial Auditorium, petitioner once again requested said Board to be allowed the right to present the musical stage play "Hair" in the Tivoli Theatre during the period November 23, 1971 through November 28, 1971, having ascertained beforehand from Clyde Hawkins, the manager of the Tivoli Theatre that the aforesaid dates were available. Respondents in their capacity as Board of Directors of the Memorial Auditorium rejected petitioner's request and indicated that *under no circumstances would they voluntarily contract with the petitioner to present the musical stage play "Hair" in the Tivoli Theatre.* (Appendix at page 8).

B. Preliminary Proceedings In The United States Federal District Court.

Petitioner herein brought this action in the District Court November 1, 1971, alleging that two days previously, on October 29, 1971, it had requested of respondents the right to present the stage production "Hair" during the period of November 23, 1971, through November 28, 1971 (less than one month from the desired date) and that the request was denied. The action was filed three weeks and one day before the desired dates. The prayer of the original complaint, sought a declaration that "Hair": 1) was an expression protected by the First and Fourteenth Amendments to the Constitution of the United States and, 2) did not violate any city ordinance, nor was it subject to the definitions given to the term "obscenity." The prayer also sought a permanent injunction enjoining the respondents: 1) mandatorily to reserve the Tivoli Theatre for Petitioner's use or, 2) to contract with the petitioner for the use of the Tivoli Theatre facilities during the period November 23, 1971 through November 28, 1971, and, 3) from interfering with, harassing, or obstructing in any manner whatever the stage production of "Hair."

A show cause hearing was held on November 4, 1971, at which respondents raised the issue that the production would violate the terms of the standard lease agreement as to which petitioner was seeking specific performance, because acts are performed in the production which violate the provisions of laws of the State and City, in direct contravention of the terms of the lease. (Exhibit 3 and Appendix p. 28) reading:

> "This agreement is made and entered into upon the following expressed covenants and conditions, all and everyone of which the lessee hereby covenants and agrees to with the lessor to keep and perform; that said lessee will comply with all laws of the United States and of the State of Tennessee and all ordinances of the City of Chattanooga and all rules and requirements of the Police and Fire Departments or other municipal authorities of the City of Chattanooga."

Respondents further argued that "due process" afforded them the right to prepare a defense and that final relief should therefore not be granted in view of the petitioner's delay in seeking the dates. The cause was taken under advisement on November 4, 1971, and the preliminary relief was denied on November 8, 1971.

On November 22, 1971, respondents filed a motion to dismiss (Appendix p. 15, 16) averring, *inter alia:* (1) that the complaint failed to state a cause of action in that the petitioner had no right to contract with respondents because the complaint averred acts would occur which would violate Section 25-28 and 6-4 of Part II of the Code of the City of Chattanooga and the common law of Tennessee on indecent exposure, and that said acts would thereby be a violation of the terms of the standard lease sought; and (2) that the complaint failed to state a substantial federal question or constitutional issue. The motion to dismiss was taken under advisement by the Court.

On March 16, 1972, Petitioners moved the Court for leave to file an Amended Complaint, motion for temporary restraining order, and application for an expedited hearing. In the Amended Complaint, a booking date of April 9, 1972, was sought at the Memorial Auditorium. On March 23, 1972,

federal district Judge Wilson entered an order allowing petitioner's motion to amend, reserving action on respondent's motion to dismiss and set the matter for jury trial on April 3, 1972, on the issues of fact in regard to obscenity.

Defendants' answer was filed March 31, 1972, (Appendix p. 17-21) and while relying on the motion to dismiss, it further averred, *inter alia*, (1) violations of the obscenity laws of the City and State would occur if plaintiffs were successful; (2) that no First Amendment rights were involved because the First Amendment does not protect conduct which is contrary to a valid State law upholding a substantial State interest; and (3) that the First Amendment does not protect obscene language or conduct such as that plaintiff sought to exhibit to the public.

C. The Trial Before An Advisory Jury.

The cause came on to be heard to a jury on April 3, 1972, and the Respondent Board, having the burden of proof commenced presentation of its proof. Respondent's proof was completed on April 4, 1972, whereupon Petitioner moved to disallow respondent's claim of obscenity and said motion was overruled. Petitioner presented its proof and the Court, after hearing further arguments on a renewed motion to disallow the claim of obscenity, took the motion under submission.

The evidence upon the trial of the obscenity issue consisted of the full script and libretto with the production notes and stage instructions (Exhibit No. 4), a recording of the sound tract of all musical numbers in the production (Exhibit No. 7), and a souvenir program (Exhibit No. 1). In addition, there was received the testimony of seven witnesses who had witnessed the production "Hair," including two witnesses who attended a performance two days previous to their testimony, and an eighth witness who had not seen the production but had read the script and gave his interpretation as a drama critic.

On April 5, 1972, petitioner's motion to disallow the claim of obscenity was overruled and the case was submitted to an advisory jury upon two issues: (1) whether or not the

production "Hair" was obscene within the definition of obscenity as it relates to freedom of speech under the First Amendment, and (2) whether or not the conduct in the production "Hair", apart from speech or symbolic speech, was obscene within the definition of obscenity as it relates to conduct.

On April 5, 1974, the jury returned the following verdict:

"(1) We, the jury, find the theatrical production 'Hair' to be obscene in accordance with the definition of obscene as it relates to freedom of speech under the First Amendment of the United States Constitution.

"(2) We, the jury, find the theatrical production 'Hair' to be obscene in accordance with the definition of obscenity as it relates to conduct . . . ."

After discharge of the jury, the Trial Court took further evidence on the action of the Board in denying a lease of its facilities to the petitioner and the standard form of lease required to be executed by all lessees (Exhibit No. 3). Following argument, the case was taken under advisement.

D. The Findings of Fact of Trial Judge Frank W. Wilson.

On April 7, 1972, U.S. District Judge Frank W. Wilson filed a memorandum opinion in which he made the following Findings of Fact:

FINDINGS OF FACT

Turning first to the issue of obscenity, the script libretto, stage instructions, musical renditions, and the testimony of the witnesses reflect the following relevant matters (It should be noted that the script, libretto, and stage instructions do not include but a small portion of the conduct hereinafter described as occurring in the play):

The souvenir program as formerly distributed in the lobby (Exhibit No. 1) identified the performers by picture and biographical information, one female performer identifying herself as follows:

FINDINGS OF FACT

"Hobbies are picking my nose, fucking, smoking dope, astro projection. All that I am or ever hope to be, I owe to my mother."

It was testified that distribution of this program had now been discontinued. Prior to the opening of the play, and to the accompaniment of music appropriate to the occasion, a "tribe" of New York "street people" start gathering for the commencement of the performance. In view of the audience the performers station themselves in various places, some mingling with the audience, with a female performer taking a seated position on center stage with her legs spread wide to expose to the audience her genital area, which is covered with the design of a cherry. Thus the stage is set for all that follows. The performance then begins to the words and music of the song "Aquarius," the melody of which, if not the words, have become nationally, if not internationally, popular, according to the evidence. The theme of the song is the coming of a new age, the age of love, the age of "Aquarius." Following this one of the street people, Burger, introduces himself by various prefixes to his name, including "Up Your Burger," accompanied by an anal finger gesture and "Pittsburger," accompanied by an under arm gesture. He then removes his pants and dressed only in jockey shorts identifies his genitals by the line, "What is this God-damned thing? 3000 pounds of Navajo jewelry? Ha! Ha! Ha!" Throwing his pants into the audience he then proceeds to mingle with the audience and, selecting a female viewer, exclaims, "I'll bet you're scared shitless."

Burger then sings a song, "Looking For My Donna," and the tribe chants a list of drugs beginning with "hashish" and ending with "Methadrine, Sex, You, WOW!" (Exhibit No. 4, p. 1-5). Another male character then sings the lyric.

"SODOMY, FELLATIO, CUNNILINGUS, PED-

FINDINGS OF FACT

ERASTY – FATHER, WHO DO THESE WORDS SOUND SO NASTY? MASTURBATION CAN BE FUN. JOIN THE HOLY ORGY, KAMA SUTRA, EVERYONE." (Exhibit No. 4, p.1-5)

The play then continues with action, songs, chants, and dialogue making reference by isolated words, broken sentences, rhyme, and rapid changes to such diverse subjects as love, peace, freedom, war, racism, air pollution, parents, the draft, hair, the the flag, drugs, and sex. The story line gradually centers upon the character Claude and his response and the response of the tribe to his having received a draft notice. When others suggest he burn his draft card, he can only bring himself to urinate upon it. The first act ends when all performers, male and female, appear nude upon the stage, the nude scene being had without dialogue and without reference to dialogue. It is also without mention in the script. Actors simulating police then appear in the audience and announce that they are under arrest for watching this "lewd, obscene show."

The second act continues with song and dialogue to develop the story of Claude's draft status, with reference interspersed to such diverse topics as interracial love, a drug "trip," impersonation of various figures from American history,[2] religion, war, and sex. The play ends with Claude's death as a result of the draft and the street people singing the song, "Let the Sunshine In," a song the testimony reflects has likewise become popular over the Nation.

Interspersed throughout the play, as reflected in

[2]Lincoln is regaled with the following lyrics: "I'm free now thanks to you. Massa Lincoln, emancipator of the slave, yeah, yeah, yeah! Emanci-mother fucking-pater of the slave, yeah, yeah, yeah! Emanci-mother fucking-pater of the slave, yeah, yeah, yeah! " With Lincoln responding, "Dang my ass . . . . I ain't dying for no white man!"

FINDINGS OF FACT

the script, is such "street language" as "ass" (Exhibit No. 4, pp. 1-20, 21 and 2-16), "fart" (Exhibit No. 4, p. 1-26), and repeated use of the words "fuck"[3] and the four letter word for excretion (Exhibit No. 4, pp. 1-7, 9 and 41). In addition, similar language and posters containing such language were used on stage but not reflected in the script.

Also, throughout the play, and not reflected in the script, are repeated acts of simulated sexual intercourse. These were testified to by every witness who had seen the play. They are often unrelated to any dialogue and accordingly could not be placed with accuracy in the script. The overwhelming evidence reflects that simulated acts of anal intercourse, frontal intercourse, heterosexual intercourse, homosexual intercourse, and group intercourse are committed throughout the play, often without reference to any dialogue, song, or story line in the play. Such acts are committed both standing up and lying down, accompanied by all the bodily movements included in such acts, all the while the actors and actresses are in close bodily contact. At one point the character Burger performs a full and complete simulation of masturbation while using a red microphone placed in his crotch to simulate his genitals. The evidence again reflects that this is unrelated to any dialogue then occurring in the play. The evidence further reflects

[3] A woman taking her departure says to the tribe, "Fuck off, kids." (Exhibit No. 4, p. 1-35). The following dialogue occurs as Claude nears his death scene:
"Burger: I hate the fucking world, don't you?
"Claude: I hate the fucking world, I hate the fucking winter, I hate these fucking streets.
"Burger: I wish the fuck it would snow at least.
"Claude: Yeah, I wish the fuck it would snow at least.
"Burger: Yeah, I wish the fuck it would.
"Claude: Oh, fuck!
"Burger: Oh, fucky, fuck, fuck!" (Exhibit No. 4, p.2-22)

FINDINGS OF FACT

that repeated acts of taking hold of other actors' genitals occur, again without reference to the dialogue. While three female actresses sing a song regarding interracial love, three male actors lie on the floor immediately below them repeatedly thrusting their genitals at the singers. At another point in the script (Exhibit No. 4, p. 2-22) the actor Claude pretends to have lost his penis. The action accompanying this line is to search for it in the mouths of other actors and actresses.

In support of the non-obscenity of the play "Hair" the plaintiff relies upon the contention that the simulated sexual acts consume only a small portion of the total performance time, that the nudity scene is brief and in reduced lighting, that the audience by attending consents to the play, that the play has been a financial success second only to the musical "Oklahoma," that the play has been performed in over 140 cities, that the music from the play has been upon the "Hit Parade," and that four other courts have found the play not to be obscene. *Southeastern Promotions, Ltd. v. City of Atlanta*, D.C. 334 F. Supp. 634 (1971); *Southeastern Promotions, Ltd. v. City of Charlotte*, D.C. 333 F. Supp. 345 (1971); *P.B.I.C., Inc. v. Byrne*, D.C., 313 F. Supp. 757 (1970); and *Southwest Productions, Inc. v. Freeman*, (U.S.D.C., E.D. Ark., 1971).[4]

[4]This Court has no knowledge of the facts before the courts in any of the cited cases, for they make little in the way of findings of fact. Furthermore, it is apparent from the evidence in this case that the manner of presentation of "Hair" is substantially modified from time to time and place to place. The version of the play upon which the findings of fact have been made by this Court was that presented two days before the trial and five days before the writing of this opinion.

In his memorandum opinion, Judge Wilson declined to follow the rule of law applied by Judge Edenfield in *Southeastern Promotions, Ltd. v. City of Atlanta*, 334 F. Supp. 634 (which held that a stage production cannot be disected into speech and non-speech components) and ruled that "when viewed in their component parts, it was perfectly clear that the actors and actresses in 'Hair' by their conduct, and apart from any element of speech, committed repeated acts of criminal obscenity that would be in violation of the ordinances of the City of Chattanooga and the statutes of the State of Tennessee forbidding acts of obscenity in public places." He further held that the relative brevity of the sexual conduct in proportion to the total time of the play and the reduced lighting constituted no defense; that simulated sexual acts are in themselves sexual conduct; that performance before a consenting audience was no defense; that the city ordinances and state statutes making obscenity a crime were a traditional application of the police power to a municipal affair and were constitutional; and that the obscenity laws relied upon in the premises met the standards laid down in *U.S. v. O'Brien*, 391 U.S. 367, 88 S. Ct. 1673, 20 L.Ed.2d 672 (May 27, 1968). In concluding, he noted that musical, literary and dramatic talent are scarce commodities, that vulgarity, nudity and obscenity are abundant and readily available and that the temptation to substitute the latter commodities for the former talents has become well nigh irresistible in the entertainment world in recent years; that "Hair" found musical talent and combined it with vulgarity, nudity, and obscenity to come up with a box office hit.

In his judgment entered on April 7, 1972, Federal District Judge Wilson ordered as follows:

> "For the reasons set forth in the memorandum of the Court, the Court is of the opinion that the defendants acted within their lawful discretion in declining to lease the Municipal Auditorium and/or the Tivoli Theater unto the plaintiff."

On April 7, 1972, Judge Wilson denied Petitioner's motion for an injunction pending appeal.

E. Proceedings in the United States Court of Appeals for the Sixth Circuit.

On appeal to the United States Court of Appeals for the Sixth Circuit the judgment was affirmed on the opinion of the trial judge. *Southeastern Promotions, Ltd. v. Conrad,* 486 F.2d 894 (May 30, 1973). Justices O'Sullivan and Weick, with McCree dissenting) the judgment was affirmed

Weick, with McCree dissenting). In additional remarks in which Judge Weick concurred, Judge O'Sullivan also held "Hair" itself to be obscene, stating:

> "Whether the play is considered separately as to its speech and its conduct, or they are joined, it is obscene . . . . ." 486 F.2d at 897.

In a separate opinion, Judge Weick also stated:

> "We do not consider here the right of a person to exhibit such a film on his own property or on property which he has rented. Our case involves only the question whether a federal court has any right to order the state to permit the exhibition for profit of filthy, obscene, sexual material on state property. Federal Courts ought not take over the operation of state facilities . . . . ." 486 F2d at 898.
>
> "No one has a constitutional right to exhibit obscene, sexual acts in public buildings. . . ." 486 F.2d at 899.

A Suggestion for Rehearing en banc was denied (7-2) on October 30, 1973, with a majority of the active judges of the Court voting against such rehearing en banc, and with Circuit Judges Edwards and McCree dissenting. The petition for rehearing was also denied with Circuit Judge McCree dissenting.

In a dissenting opinion from the denial of the rehearing en banc Circuit Judges Edwards and McCree took note of this Court's ruling in *Miller v. California, supra,* and stated:

> "While I would agree that at least some of the acts described so vividly in the opinions of the District Court *(Southeastern Promotions, Ltd. v. Conrad et al.,* 341 F.

Supp. 465 (E.D. Tenn. 1972) and of this court *(Southeastern Promotions, Ltd. v. Conrad et al.*, 486 F.2d 894 (6th Cir. 1973) could, if viewed separately, appropriately be labelled obscene under the present standards of the United States Supreme Court (see *Miller v. California, supra,* U.S. at , 93 S.Ct. at 2615.) I do not agree that the play may be judged obscene, unless it is 'taken as a whole' for purposes of that judgment. Thus far we have signally failed to do this. Taking words and sentences out of context, taking gestures employed in a play without reference to the rest of the play as has been done herein does not comply with the standard set out in *Miller, supra,* and *Roth, supra."*

Those judges also thought that the standards employed by the Municipal Board in rejecting the application for rental at the theater were clearly unconstitutionally vague. In a footnote, such standards were characterized by those justices as "clean and healthful and culturally uplifting." The Edwards-McCree dissent also asserted:

"Unless the Supreme Court grants certiorari, this case will represent a final adjudication that the play 'Hair' is obscene and subject to being banned under state obscenity laws in Michigan, Ohio, Kentucky and Tennessee. . . . . "

In replying to the latter claim, Circuit Judge Weick wrote a separate reply (with Judge O'Sullivan concurring) stating:

"We respectfully disagree. The procedural setting of this litigation makes clear the invalidity of such observation, as well as the inapplicability of the authorities cited in the dissent."

In his opinion Judge Weick noted that the case was one for equitable relief and that "a court of equity cannot be faulted for withholding its writ whereby to command the Directors of the Auditorium to allow exhibition therein of a production containing the language and conduct set out in the District Judge's opinion." Judge Weick also noted that, "it was not improper for the District Judge to consider whether the play was obscene before determining whether or not to order the Directors of the Auditorium to allow its exhibition in Chattanooga . . . . "

On December 26, 1972, Petitioner filed a petition for a writ of certiorari with this Court and on February 19, 1974, the writ was granted.

SUMMARY OF ARGUMENT

The gist of Southeastern's alleged federal cause of action is a claim in contract for specific performance, based upon an alleged federal "civil right" arising out of a First Amendment right to "free speech." In its complaint, petitioner admitted that nude *conduct* is present in the production of "Hair" and affirmatively pleaded that obscenity is one of the issues upon which respondent's refusal to contract is based. Under such an admitted statement of facts, it can hardly be said that a classic example of an 1871 Civil Rights' violation has been pleaded. On the contrary, by such admissions petitioner has pleaded itself out of court. The confession of such facts establishes a prima facie violation of a city ordinance involving sexual conduct in public and an inability to meet the terms of the standard city lease.

The motion to dismiss should have been granted. By admitting a "sexual conduct" violation, it became incumbent upon the petitioner, as a part of his "avoidance" plea to affirmatively allege and establish wherein the principles expressed in *U.S. v O'Brien* 391 U.S. 367, were not applicable and did not support the City's refusal to lease.

There is a difference between the plenary power of local government to suppress "obscene conduct" as malum in se, and the power of government to suppress "obscene materials" involving thought processes. The latter is not plenary and is subject to the "free speech" rights of an individual. The right to proscribe lewd *conduct* stems from the Common Law crime, first recognized as a separate offense in 1688 when Sir Charles Sedley exposed himself in the nude on the balcony of a tavern in Covent Garden, England. 1 Sid. 1688. On the other hand, the separate and distinct offense of "obscene libel" dealing with obscene speech and thought processes (obscene "materials" crime as we know it) was not recognized until 40 years later. *Rex v. Curl* 2 Strange 789 (1727). Both principles were absorbed into our laws by the early American courts. The entire body of legal precedent since that time establishes beyond doubt that the former power, namely: the right of the community to proscribe sexual conduct in public is, and remains, plenary, and is in no way

subservient to any claimed right of an individual to "free speech." Nor did it become so through adoption of the Fourteenth Amendment.

The power being questioned is one of the most basic powers of local government - the power possessed by municipal government in aid of its duty to protect the public morals of the local community against that type of public conduct which is regarded as malum in se. That municipal power is inherent in government itself, and is so basic that its grant of authority is said to be "implied" and to flow from the Common Law, rather than from "express" provisions in the city's charter or the general laws of the State.

The plenary nature of the municipal power to control sexual "conduct" declared malum in se is seen in its purest form in the civil process when the municipal power of safeguarding public morals under valid Sir Charles Sedley statutes is exercised in equity to enjoin the prospective use of obscene conduct.

Every obscene conduct issue should not be escalated into a First Amendment crises in the Federal District Courts - particularly where as here, an important governmental interest is being furthered and local government is attempting to discharge its historic responsibility to the community to maintain a healthy moral climate and prevent obscene conduct in public.

The legislative history recently reviewed by this court in *Griffin v. Breckenridge* 403 U.S. 88, surrounding the 1871 enactment, indicates that Congress in 1871 never intended that the 1871 Civil Rights Act should be made a vehicle for converting the Federal District Court into a trial court for every case in which a local community seeks, through its representatives, to prevent an individual from "uninating on the balcony of city hall."

POINT I

SOUTHEASTERN PROMOTIONS, LTD. HAS FAILED TO STATE A CAUSE OF ACTION AS TO WHICH A FEDERAL COURT HAS ORIGINAL JURISDICTION UNDER THE CIVIL RIGHTS ACT OF 1871.

(A) In Admitting A *Prima Facie* "Nude Conduct" Violation, the Complaint Is Fatally Defective.

The substantive grounds upon which Southeastern Promotions, Ltd. relied in bringing the federal lawsuit is the Civil Rights Act of 1871 (42 U.S.C. Sec. 1983). While Southeastern Promotions, Ltd. also claims federal jurisdiction by virtue of 28 U.S.C. Sec. 1332 (Diversity) and 28 U.S.C. Sec. 2201 and 2202 (Declaratory Judgment), those procedural claims also fail where it is established that federal jurisdiction does not lie under the substantive claim (42 U.S.C. Sec. 1983).

The gist of Southeastern's alleged federal cause of action is a claim in contract for specific performance based upon an alleged federal "civil right" arising out of a First Amendment right to "free speech".[3] In its complaint filed in the Federal District Court, petitioner Southeastern Promotions, Ltd. admitted that nude conduct is present in the production of "Hair" and *affirmatively pleaded* that obscenity is one of the issues upon which respondent's refusal to contract is based. See the Complaint at page 9, reading:

> "The plaintiff alleges upon information and belief that the production of 'Hair' which it seeks to show in the City of Chattanooga *displays very little nudity per se*, and that this show is not obscene within the legal meaning of that term . . . . " (Our emphasis.)

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[3]While Petitioner may be able to establish diversity of citizenship jurisdiction of a civil action having original jurisdiction in a trial court of the State of Tennessee, such was not the action which was pleaded. The allegations are as to unlawful "state action" under the Civil Rights Statute of 1871.

See also petitioner's prayer for declaratory relief (Appendix page 14):

> "2. That the production, as aforesaid, *does not violate any city ordinance* nor is the same subject to the definitions given to the term 'obscenity'." (Our emphasis.)

Under such an admitted statement of facts it can hardly be said that a classic example of an 1871 Civil Rights' violation has been pleaded. On the contrary, petitioner's pleading is essentially one of confession and avoidance and demonstrates that the Complaint is fatally defective. Petitioner is entitled to *no* federal relief under the century old federal statute.

While confessing facts which establish a *prima facie violation* of a city ordinance involving sexual conduct in public (which establishes a *prima facie* inability to meet the conditions of the standard city lease covering such property) Southeastern Promotions, Ltd. nevertheless contends that the Federal District Court should perforce interpret the same as being symbolic speech and declare the City's action in refusing to enter the lease as governmental action which is illegal, and force the City to enter the lease. Although the Tivoli Theater and the Municipal Auditorium are customarily operated by the City in a proprietary capacity and there is no affirmative showing that such theaters are the only ones available for such use in the City of Chattanooga,[4] petitioner nevertheless equates such refusal to lease as being "state action".

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[4]This is not a licensing case wherein the city is using its governmental power to prevent the Petitioner from performing "Hair" in the City of Chattanooga unless the promoters remove the alleged lewd conduct (compare Freedman v. Maryland, 380 US 51, 13 L Ed.2d 649, 85 S Ct 734 (Mar. 1, 1965)). Although Petitioner originally alleged on information and belief (Appendix page 12) that there was no other adequate facility, other than the Tivoli Theater, to produce "Hair", that allegation was later contradicted by its Amendment to the Complaint which substituted the Municipal Auditorium for the Tivoli Theater, Respondent denied such allegation (Appendix page 20, at para. 10, and page 21, at para. 11) and Petitioner apparently abandoned that claim, for they introduced no evidence on that claim and the trial judge had no occasion to make a finding on that matter.

The City through the manager of the "Tivoli" took a different view of the factual situation and status of the law and informed Southeastern Promotions, Ltd. that the terms of the lease, *which is customarily used*, by the City in its contracts, require that the lessee must comply with all laws of the United States and of the State of Tennessee and all ordinances of the City of Chattanooga (Appendix page 28); that public nudity has *never* been allowed on the stage of the Auditorium or the Tivoli (Appendix page 48) much less mixed nudity (male and female) of the entire cast (Appendix page 23) and that public nudity was forbidden by Sections 25-28 of the Code of the City of Chattanooga; that Section 6-4 makes it unlawful to conduct any exhibition which was offensive to decency (Appendix page 29); that the nudity and language was discussed and it was determined that the booking should be denied in that it would not be in the best interest of the public (Appendix pages 25, 56).[5]

[5]The facts herein closely resemble the factual situation in P.B.I.C. v. District Attorney of Suffolk County (see Statement of Facts at page 7 and the opinion of the Supreme Judicial Court of Massachusetts at Appendix B to this Brief) which never reached this Court. Being civil in nature and prospective in operation, both cases focused upon *one single* question, namely, the extent of the governmental power to prohibit explicit sexual conduct in public as being contrary to good morals -- is it or is it not plenary? Compare the confusion which is reached when the criminal process is used and other issues are injected into the case. P. B. I. C. v. Garrett Byrne, 313 F.Supp. 757 (May 6, 1970) vacated and remanded to consider the question of mootness, in Byrne v. P. B. I. C., Inc., 401 US 987, 28 L Ed 2d 526, 91 S Ct1222 (Mar. 29, 1971). The differing issues presented in the civil and criminal approaches are commented upon more fully in Appendix A to this Brief, also referred to in Moving Party's Motion herein at page 3.

(B) ***The Power of Local Government to Proscribe "Sexual Conduct" in Public as Malum in se And Contra Good Morals, is Plenary, And May Not Be Nullified By a Plea of Confession And Avoidance on a General Allegation That the Same is Symbolic Speech. Where the Pleadings Demonstrate on Their Face That Governmental Regulation may be Justified Under Principles Expressed in U.S. v. O'Brien, such General Allegations of Confession And Avoidance do Not State a Claim Upon Which Relief Can be Granted Under 42 U.S.C. Section 1983.***

The state of the pleadings at this juncture was sufficient to establish that, as a matter of law, a substantial federal question regarding a Civil Rights violation based upon "state action" had *not* been stated and a motion to dismiss should have been granted. Unlawful sexual conduct in public does not become speech merely because the actor intended thereby to express an idea. Assuming that the actor does express an idea by the unlawful, sexual conduct, such does not make it "Constitutionally Protected Speech" so as to defeat other more important constitutional interests which are being weighed in the balance. In admitting a "sexual conduct" violation, it became incumbent upon the petitioner, as a part of his "avoidance" plea, to affirmatively allege and establish wherein the principles expressed in the principles expressed in *U.S. v. O'Brien*, 391 US 367, 20 L Ed2d 672, 88 S Ct 1673 (May 27, 1968) had been violated in the City's refusal to lease the City's premises. Compare the numerous "Hair" decisions holding to the contrary and referred to herein at page 10, supra. See, also, the judgment of the trial court below[6] and

[6]While the trial court's judgment was simply that "For the reasons set forth in the memorandum of the Court, the Court is of the opinion that the defendants acted within their lawful discretion in declining to lease the Municipal Auditorium and/or the Tivoli Theater unto the plaintiff . . . ." and while the memorandum of the Court indicates that Respondent's Motion to Dismiss was denied because the Amended Complaint raised questions of fact which required a trial, see 341 F.Supp.

the concurring opinion of Circuit Court of Appeal Judge Weick (supra, at page 21).

Amicus submits that the eagerness of federal courts to sustain 42 U.S.C. Section 1983 jurisdiction in the above "Hair" cases demonstrates the mischief-making quality of the narrow-minded approach of those courts to this type of case, that is, a failure to recognize and pay proper deference to the difference between the plenary power of local government to suppress "obscene conduct" as *malum in se*, and the power of government to suppress "obscene materials" involving thought processes, which latter power is not plenary and which is subject to the "free speech" rights of an individual. This distinction was first noted by Justice Douglas in his dissent in two criminal cases involving "obscene materials" and the latter power. Roth-Alberts, 354 US 476 at 512, 1 L Ed 2d 1498, 72 S Ct 1304 (June 24, 1957):

> "I assume there is nothing in the Constitution which forbids Congress from using its power over the mails to proscribe *conduct* on the ground of good morals. No one would suggest that the First Amendment permits nudity in public places, adultery, and other phases of sexual mis-

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465, at 470:

> "The third ground in the defendants' motion to dismiss, namely that the theatrical production for which a lease is sought by the plaintiff would violate both ordinances of the City of Chattanooga and laws of the State of Tennessee relating to both public nudity and obscenity, raises issues of both fact and law which can only be decided after a trial on the merits of these contentions. These matters will accordingly be considered in the portion of this opinion dealing with the trial of the cause on its merits. . . ."

Amicus submits that such dismissal should have been granted on the grounds that the pleadings, as amended, did not state a claim upon which relief could be granted. Where, as here, the pleadings on their face show a prima facie violation of a "Sir Charles Sedley's" statute regarding "sexual conduct" in public, any civil rights claim based upon a denial of free speech arising out of the construction of the statute as applied should be dismissed where the petitioner fails to allege sufficient facts which place in issue the Government's good faith reliance upon the principles expressed in U.S. v. O'Brien, supra. Compare Bell v. Hood 327 US 678, 90 L Ed 2d 939, 66 S Ct 773, 13 A LR 2d 383.

conduct . . . ." (Our emphasis.)

Amicus submits that a proper perspective of the limits of each of the two powers can only be had by examining the origin, and tracing the historical development and limitation of each under the law.

The right to proscribe lewd *conduct* stems from the Common Law Crime, first recognized as a separate offense in 1688 when Sir Charles Sedley was brought before the common law courts on a breach of the peace charge for "exposing" himself in the nude on the balcony of a tavern in Covent Garden, England, 1 Sid 1688. Common law crimes rested upon general reception and usage and were established by showing that it always had been the custom in the community to observe the *standard of conduct* which had been violated. On that occasion, Sedley urinated onto the courtyard below and delivered an obscene and blasphemous speech. In that case, the common law courts declared Sedley's *conduct* to be a common law crime -- the origin of the common law of Tennessee on indecent exposure, pleaded by respondents in the motion to dismiss[7] (Appendix page 15).

On the other hand, the separate and distinct offense of "obscene libel", dealing with obscene speech and thought processes (obscene "materials" crime as we know it) however, was not recognized until 40 years later. *Rex v. Curl*, 2 Strange 789 (1727). At that time the English novel had come into being and that and other writings were becoming pornographic. To meet that social problem, the House of Lords in 1727, in a case involving the distribution of an obscene *publication* by a printer named Curl, drew an anology to the law regarding "conduct" laid down in Sedley's case and held this also to be a common law crime – the so-called "obscene libel".

When the founding fathers settled in America shortly thereafter, they brought with them the Common Law of England, including both the law against lewd "conduct" and the

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[7] Amicus has no difficulty in seeing a parallel in the conduct of Sir Charles Sedley (one of the REstoration rakes) and the lewd conduct which is interwoven into "Hair". The only difference is that "Hair" chose to illuminate the same with a spotlight.

law against obscene "publications". These principles were immediately absorbed into our laws through recognition by the early American courts and were later codified in the laws of Congress and each of the states of the Union. Based upon Judaeo-Christian norms and designed for the protection of the family structure, both of these laws have governed this Nation for close to 200 years.

The entire body of legal precedent since that time establishes beyong doubt that the former power, that is, *the right of the community to proscribe sexual conduct in public is, and remains plenary and is in no way subservient to any claimed right of an individual to "free speech"*, as petitioner herein argues did occur under the Civil Rights Act enacted in 1871. In point of fact, until the adoption of the Fourteenth Amendment in 1868, there was no basis whatsoever for voicing such a claim.

There can be no doubt but that if the City of Chattanooga in 1860 had denied the use of both the Tivoli and the Municipal Auditorium to the promoters of "Hair" on the grounds that the nudity and other lewd conduct portrayed therein violated the public indecency laws, the exercise of that municipal power could not have been questioned by any assertion of a First Amendment "free speech" claim. *Barrow v. The Mayor and City Council of Baltimore*, 7 Pet. 243, 8 L Ed 672 (1833). The rationale which required that result is elementary. The power under question is one of the most basic powers of local government -- the power possessed by municipal government in aid of its duty to protect the public morals of the local community against that type of public conduct which is regarded as being *malum in se*. In addressing himself to the public morals issue and the pre-eminent power of local government to control the same, Woods describes the danger as being in the nature of a "nuisance per se." See "The Law of Nuisances" by H. G. Wood §23 and 24 at pages 45-46:

> §23. Acts affecting public morals, public nuisances per se, when. – There are classes or kinds of business which are nuisances per se, and the very fact that they are carried on in a public place is *prima facie* sufficient to establish the the offense. But in such cases, if the respondent questions

that the use of his property in the manner charged in the indictment produces the effects set forth therein, and introduces evidence to sustain his position, it then becomes necessary to prove that the effects are such as are charged. But there are a class of nuisances arising from the use of real property and from one's personal conduct that are nuisances *per se*, irrespective of their results and location, and the existence of which only need to be proved in any locality, whether near to or far removed from cities, towns, or human habitations, to bring them within the purview of public nuisances. *This latter class are those intangible injuries which affect the morality of mankind, and are in derogation of public morals and public decency.*

§24. Wrongs malum in se. – *This class of nuisances are of that aggravated class of wrongs that, being malum in se, the courts need no proof of their bad results and require none. The experience of all mankind comdemns any occupation that tampers with the public morals, tends to idleness and the promotion of evil manners, and anything that produces that result finds no encouragement from the law, but is universally regarded and condemned by it as a public nuisance.* (Our emphasis.)

That municipal power is inherent in government itself and is so basic that its grant of authority is said to be "implied", and to flow from the Common Law rather than from "express" provisions in the City's Charter or the General Laws of the State. See The Law of Nuisances, Woods, §743, at page 972:

§743. No control over nuisances without special power. – Therefore, a municipal corporation has no control over nuisances existing within its corporate limits except such as is conferred upon it by its charter or by general law. *There can be no question, however, but that, where a nuisance exists within its corporate limits that is clearly a nuisance at common law* or by statute, which is detrimental to the health of the inhabitants, *it may be abated by the authorities, but it must be a nuisance at common law* and one which any person injured thereby might lawfully

abate of his own motion, or in the absence of express or implied authority given, the removal or abatement of the nuisance would be unlawful. Where the thing abated is is clearly a nuisance, and one which affects the *health* of the city, the abatement may be made bv the authorities or by any person injured thereby. *The common law in such a case comes in aid of the authorities, and they are justified in the act, not because they are officials of the city, but because they are citizens injured by the thing abated.* (Our emphasis.)

Joyce, in his treatise "Law of Nuisance" §345 notes that this common law power entrusts the municipal corporation with not only the right but the obligation to remove the nuisance, at page 498:

"The rule is declared to be settled, without dissent, that, without a special grant of authority, public corporations may, as a common law power, cause the abatement of nuisances, and if the nuisance cannot otherwise be abated, may destroy the thing which constitutes it. And it is said that a municipal corporation has not only the right, but is also under the obligation, to remove nuisances which may endanger the health of its citizens; that it has the power to decide in what manner this shall be done; and that its decision is conclusive unless it transcends the power conferred by the charter or violates the constitution."

The importance of this municipal power was stressed by this Court in *James Phalen v. The Commonwealth of Virginia*, ___ US ___, 12 L Ed 1030, 1033, ___ S Ct. ___ (_____ _____, 1850):

"The suppression of nuisances injurious to public health or morality is among the most important duties of government . . . ."

"It is a principle of the common law, that the king cannot sanction a nuisance . . . ."

Since this power of local municipal government has ever been regarded as being of utmost importance and *most certainly was one which was not limited by the First Amendment prior to the adoption of the Fourteenth Amendment in 1868,*

it is illogical and unwarranted to say that that situation was changed with the adoption of the Fourteenth Amendment in 1868, or with the enactment of the Civil Rights Act three years later in 1871. While it is true under the incorporation principle that "the due process clause of the Fourteenth Amendment may make it unlawful for a state to abridge by its statutes the freedom of speech which the First Amendment safeguards against encroachment by the Congress", *Palko v. Connecticut*, 302 US 319, 58 S Ct 149, 82 L Ed 288 (1937), there is absolutely nothing in the historical facts surrounding those events which would lend any credence to the argument that this plenary right of municipal government, to prohibit lewd *conduct* by either criminal or civil sanctions, so highly praised by this Court in *Phalan v. Commonwealth of Virginia, supra*, in 1850, was to be disturbed in the slightest.

The plenary nature of the municipal power to control sexual "conduct" declared *malum in se* is seen *in its clearest form* in the *civil* process when the municipal power of safeguarding public morals under valid Sir Charles Sedley statutes is exercised in equity to enjoin the *prospective* use of obscene conduct. Confession and avoidance is not a defense to a legitimate exercise of municipal power under the Sir Charles Sedley statutes. It is no defense against the exercise of a municipal government's plenary powers to safeguard public morals and abate moral nuisance to confess that the illegal conduct which is about to be portrayed in public is a violation of common law "conduct" statutes yet seek to avoid the exercise of that local municipal power to abate the same by asserting a claim that such is protected because it is interwoven with a free speech right. See *P.B.I. C. Inc.et. al. v. Dist. Atty. of Suffolk County*. 258 N.E 2d 82 (April 9, 1970) a copy of which appears at Appendix B to this Brief.

Under petitioner's theory, it is difficult to imagine any "state action" against obscene conduct which may not be pleaded as the basis of a "due process" claim in the Federal District Court under 42 U.S.C. Sec. 1983. For example, on a broader scale than "Hair", but equally in point, would not the City, under its broad historical powers to protect public morality in the local community, possess the governmental

right to enact an ordinance that one may not exhibit a film commercially which depicts an explicit act of oral sodomy, and enjoy the concomitant right to enforce such specific prohibition against offending films, such as "Deep Throat", in a state court action under principles expressed by this Court in *U. S. v. O'Brien, supra* . . . or is local government doomed in each instance to be relegated to a prolonged and costly trial of a 1983 cause in a Federal District Court with the primary issue being whether the explicit sexual conduct (expressly prohibited under the police power) is "excused" under the "taken as a whole" formula of *Miller v. California*?* To apply the latter proposition to the conduct in "Hair" and "Deep Throat" would, historically speaking, emasculate the common law principle upon which Sir Charles Sedley was arrested in 1688 when he "urinated" and "exposed" himself on the balcony of Covent Garden, England for, in a historical sense, it could be argued that Sedley was just a rebel "speaking" against the morals of his time. Can it be claimed that, under 42 U.S.C. Sec. 1983, Sedley should be entitled to a federal declaratory judgment against the City on the grounds that he had a civil right and intended to continue such conduct nightly, while out on bail, as a form of "symbolic speech" against the contemporary mores? Similarly, under *Steffel v. Thompson*, ___ US ___ 39 L Ed 2d 505, ___ S Ct _____ (March 19, 1973) would one of Sedley's drinking partners, who refrained momentarily, have been entitled to a declaratory judgment against the City that his conduct was free speech, or that the breach of the peace charge would be unconstitutional if applied to him in the future?

Every obscene conduct issue should not be escalated into a First Amendment crisis in the Federal District Courts – particularly where, as here, an important governmental interest is being furthered and local government is attempting to discharge its historic responsibility to the community to

*See Appendix A to this Brief, being pages 33 to 39 of the Brief, Amicus Curiae of C. H. Keating, Jr. in support of Appellees in Jenkins v. Georgia, No. 73-557, which is referred to herein at page 4 of the Motion of Amicus Curiae.

maintain a healthy moral climate and prevent obscene conduct in public. It is a mistake for this Court to blithely extend federal jurisdiction to every claim made by a "Sir Charles Sedley". See *Rex v. Sedley*, 1 Sid. 168. Circuit Judge Weick said as much in his concurring opinion in 486 F.2d 898:

> "The auditorium involved in this case belonged to the City, which is a political subdivision of the state. It was constructed with taxpayers' money. It goes without saying that the city fathers could not be compelled to rent the auditorium to a person who desired to operate therein a house of ill fame, in violation of state law. Yet the conduct exhibited by the film in the present case is even worse as it portrays obscene sexual acts which could be committed only by depraved persons.
>
> "Our case involves only the question whether a Federal Court has any right to order the state to permit the exhibition for profit of filthy, obscene, sexual material on state property. Federal Courts ought not take over the operation of state facilities.
>
> "In *California v. LaRue*, 409 U.S. 109, 93 S. Ct. 390, 34 L.Ed.2d 342 (1972), the court upheld the right of the state to prohibit the exhibition of obscene material in a private saloon. Here we are dealing, not with private property, but with public property and with police power of the state.
>
> "As pointed out in LaRue, the First Amendment protects 'expression', not 'action'. Our case involves only depraved sexual action.
>
> "We would doubt that a Federal Court would ever attempt to compel the Federal Government to rent its property for any such immoral purpose. It is also inconceivable that a Federal Court would order such an exhibition to be held in the Eisenhower Theater located in the John F. Kennedy Center for the Performing Arts at the Capitol. State facilities should be treated with the same respect as federal facilities.
>
> "No one has a constitutional right to exhibit obscene sexual acts in public buildings."

C. The Congressional Purpose in Passing the Civil Rights Act of 1871 (42 U.S.C. Sec. 1983 and 1985) Was to Prevent Racial Discrimination. It Was Never the Intent of Congress at That Time That Those Sections Should be Interpreted to Authorize Interference With the Common Law Powers of Local Municipal Governments to Declare What Constitutes And to Prevent Moral Public Nuisances in the Form of Lewd Public Conduct.

Amicus submits that the legislative history recently reviewed by this Court in *Griffen v. Breckenridge*, 403 US 88, 29 L Ed 2d 338, 91 S Ct 1790 (June 7, 1971) surrounding the 1871 enactment, indicates that Congress in 1871 never intended that the 1871 Civil Rights Act should be made a vehicle for converting the Federal District Court into a trial court for every case in which a local community seeks, through its representatives, to prevent an individual from "urinating on the balcony of city hall". To recognize in the face of such lewd conduct a cognizable First Amendment "free speech" claim is to forget that our constitutional right of the community to control public morality has its historical roots in the Common Law (1688) and not in the judicial legislation of the 1940's when certain Justices on this Court (Justice Douglas, et al.) opted to expand the boundaries of the "state action" concept of an 1871 Act of Congress.

On the basic issue of whether Southeastern Promotions, Ltd. has stated a federal cause of action under 42 U.S.C. Sec. 1983, this Court cannot avoid the implication of the rationale expressed by it in *Griffen v. Breckenridge, supra*, that the Civil Rights Act of 1871 requires an animus of racial bias or class based invidious discrimination. In *Griffen*, Justice Stewart was required to examine the congressional purpose behind the Civil Rights Act of 1871 (as it related to (1) the meaning, and (2) the scope of 42 U.S.C. Sec. 1983(3) the conspiracy crime). Specifically, the Court was faced with the question of whether, in the context of a racial controversy, Section 1985 (3) embraced a conspiracy crime of private individuals. The decision rendered as to its "meaning", i.e., that the 1871 legislation was intended to create a conspiracy crime to cover

private action by individuals was based upon two factors: (1) The plain language of 42 U.S.C. Sec. 1985, and (2) the statutory scheme of the 1871 Civil Rights action taken as a whole (42 U.S.C. Secs. 1983 and 1985). The further question as to its scope was based upon a third factor: (3) The legislative history in 1871 of the Civil Rights legislation.

The decision relating to "meaning," (i.e., *not* to read the Section 1983 phrase of "under color of state law" into 42 U.S.C. Sec. 1985(3)) was based upon statutory construction and the requirement that both sections, 1983 and 1985, must be read together and construed as a whole. Reading the two sections together, the Court concluded that to read the "under color of state law" phrase of 1983 into Section 1985 would duplicate the "under color of state law" conspiracy crime already present in 42 U.S.C. Sec. 1983 and would be unreasonable.

Having found a legislative intent to create a conspiracy crime of individuals under 42 U.S.C. Sec. 1985, the Court was then faced with a further question as to its "scope" and the prospect that such section might be regarded as a broad general federal tort law. To avoid that result, Justice Stewart examined the legislative arguments which took place at the time of the passage of the 1871 legislation and concluded therefrom that the legislative intent in adopting such language was that there must also be some racial, or perhaps otherwise class based invidiously discriminatory animus for a conspiracy action of individuals to lie under 42 U.S.C. Sec. 1985.

What this Court failed to consider, however, is that the same logic should then apply in reverse. Since it was never the intention of Section 1985 to reach other than "racial, or perhaps otherwise class based invidiously discriminatory animus" and since under the first step in its *Griffen* reasoning, Sections 1985 and 1983 must be read together as a whole, then it was equally necessary to apply the "racial or class based invidiously discriminatory animus" restriction to Section 1983. In sum total, under *Griffen*, the judicial legislation of the 1940's which expanded the boundaries of the "state action" concept of the 1871 Act of Congress was ill-conceived as beyond the intent of the legislators.

The irrational state of the present interpretation of the Civil Rights Act of 1871, which has not since been amended, is brought into clear focus by the peculiar factual situation in a recent Civil Rights action now pending in a Federal District Court in the Central District of California, *Vincent Miranda, dba Walnut Properties and Pussycat Theatre, Hollywood vs Donna Bagley et al* No. 73-195-H.P. In that situation, a porno theater was located within the area of a city being considered for redevelopment. It was alleged in that Civil Rights action that during the hearings on redevelopment, one of the defendants, a private citizen and the foe of the porno theater, suggested at a public hearing that one of the benefits of the redevelopment plan would be that the city would be rid of the porno theater. Thereafter, the city had occasion to informally look into the prospect of acquiring the property for a civic art theater. Much later the redevelopment plan was defeated. When the theater commenced showing hard-core pornographic films, like "Deep Throat", and the city took law enforcement action against the same under the state obscenity statutes, the theater owner filed a 2-count federal civil rights action in the Federal District Court against the city and the private citizen who was reported to have advocated the use of the eminent domain power for redevelopment as a means of getting rid of the porno theater. The first cause of action against the private citizen and city council members was conspiracy to violate 42 U.S.C. Sec. 1983. The second cause of action against the private citizen and city council members *on the same facts* was conspiracy to violate 42 U.S.C. Sec. 1985(3). On demurrer to the complaint, the trial court conceded that the 1985 (3) action must be dismissed on the grounds of *Griffen* for failure to allege racial bias or class based invidiously discriminatory animus, but would not dismiss the conspiracy action against the private citizen based upon Section 1983 - - a result which flies in the fact of the legislative intent of the 1871 Act as discussed by Justice Stewart in *Griffen*.

CONCLUSION

A municipality's plenary power to apply lewd conduct laws against a *prima facie* violation within its boundary, is not subject to collateral attack in a civil rights action in the federal courts, brought pursuant to 42 USC section 1983. Further, the federal district court should dismiss such a lawsuit on the grounds of failure to state a claim upon which relief can be granted, where the federal pleadings fail to affirmatively allege the specific facts which prevent the municipality from relying upon the principles of law expressed in *U.S. v. O'Brien, supra.*

The judgment of the trial court dismissing the lawsuit should be affirmed on the grounds of failure to state a claim upon which relief can be granted, or on the alternative ground relied upon by the trial judge, namely; that the City officials acted within their lawful discretion under the law expressed in *U.S. v. O'Brien, supra,* when they applied the lewd conduct laws independently to the conduct which was to be engaged in during the public performance of "Hair".

Respectfully submitted,

_____

Charles H. Keating Jr.
Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on this day of October, 1974, copies of the within Amicus Curiae Brief were airmailed, postage prepaid, to the below listed parties to the proceedings. I further certify that all parties required to be served have been served.

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Appendix A

A. The Problem of Applying Civil and Criminal Sanctions to Lewd Conduct in Motion Picture Films.

The communication media is plagued at the present time with an avalanche of lewd displays and language which, if engaged in off-stage or off-screen and in public, would be subject to criminal penalties as improper public conduct. It beggars logic to say that an act of sodomy or perversion is punishable as a felony,[15A] and at the same time hold that a 2 1/2 minute pictorial display of sodomy on an enlarged motion picture screen, albeit simulated, to a public audience, as a part of commercial entertainment, (See Appen. A at pages A78 -A84 and Appen. B at pages B24-B27) may not be reached by legal sanctions, both civil and criminal. Further, it is equally as illogical to say, on the one hand, that such conduct may be reached by civil sanctions, see *Evans Theatre Corporation v. Slaton*, 227 Ga 377, 180 SE 2 712, cert denied in *Evans Theatre Corp. v. Slaton*, 404 US 950, 30 L.Ed. 2, 267, 92 S. Ct. 281, (Nov. 9, 1971), yet may not be reached by criminal

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[15A] See Stone v. Wainwright U.S. , 50 L.Ed. 2d 179, S.Ct. (Nov. 5, 1973) discussed at Footnote 24, infra.

Which is more devastating to society. . . a 2-1/2 minute scene of simulated oral sodomy projected on a public screen of a neighborhood theaer to a packed audience of 17 year olds and older, or several acts of explicit oral sodomy (e. g. Deep Throat) projected on a public screen in a porno theater, located on run-down Main Street or in a local neighborhood? Does any member of this Court have the right to draw such a distinction? See Judge Learned Hand's views at footnote 36, and the views of the Georgia Supreme Court in Evans Theater Corp. v. Slaton, supra, quoted at page 13, supra. Further, does the state of the public morals of this nation in 1974 support the thesis of Justices Brennen, Stewart, Marshall, and Douglas which underlies their dissenting opinions in Miller v. California, et al, supra, that we, as a nation, can withstand the assault such a distinction would encourage. See footnote 24 infra.

sanctions. . . or, that it may be reached by criminal sanctions, but only when examined, not as to conduct but, in accordance with the test for "obscene material" established by this Court in *Miller v. California, supra.*

It would appear that, unless there is *now* a different explanation in our jurisprudence, that is exactly what Justice Douglas was willing to admit to, in his 1957 dissent, in reviewing two criminal cases in Roth-Alberts, 354 US 476, at 512, 1 L.Ed. 2 1498, 77 S.Ct 1304 (June 24, 1957:

> "I assume there is nothing in the Constitution which forbids Congress from using its power over the mails to proscribe *conduct* on the ground of good morals. No one would suggest that the First Amendment permits nudity in public places, adultery, and other phases of sexual misconduct. . . ." (Our emphasis.)

Analytically, there are two separate problems presented here, each of which deserves a separate analysis. The first is the question raised on the civil side of the issue, as it pertains to the right of government to enjoin the public exhibition of explicit sexual conduct based upon a stated public policy, either judicially determined or legislatively determined. The second is the question raised on the criminal side of the same issue, as it pertains to the right of government to impose criminal sanctions upon those persons who, for whatever reason, elect to engage in conduct which contravenes the public policy which forbids such public displays.

Even though the statute under attack herein is a criminal statute imposing criminal sanctions, and the case under review is an appeal from a criminal conviction arising out of the application of that criminal statute to specific subject matter, still, the attention of this Court would be misguided were it to undertake an analysis of the criminal statute or its application in a given circumstance, without, at the outset examining, and bringing into focus the extent of the governmental power which exists under the *civil* remedy where lewd conduct is involved. That is essential, in order that side considerations which appear upon an analysis of the criminal sanctions, such as "fair notice", "mens rea", and "scienter" considerations,

etc., may not cloud and obfuscate the broad reach of the governmental policy against public lewdness.

B. A State's Power to Apply Civil Sanctions to Lewd Conduct on Films Has No Limitations such as Those Stated in Miller v. Calif., as to Obscene Materials.

The caveat which Amicus seeks to articulate can best be brought into focus by an illustration which takes into account the subject matter "Carnal Knowledge" and the surrounding historical facts when, in Jan. and Feb. of 1972, the case was prosecuted in Albany, Georgia. Suppose, for example, that the Dougherty County District Attorney had not been frustrated by the shrewd defense tactics of Billy Jenkins' lawyer, who removed the Dougherty County Superior Court civil action *Robert Reynolds, District Attorney v. S.W.J., Inc.*, C.A. No. 7296, to the Federal District Court. (See Statement of Facts, at Point B2 on pages 16-17), and had been able to try the basic issue as to "Carnal Knowledge" on the *civil* injunction side of the Georgia Courts, as was done in the "I Am Curious (Yellow)" case in Atlanta, Georgia? Amicus submits that, in that case, the focus would have been sharpened so that no one could have misread the real issue, not even the three justices who dissented in Jenkins v. Georgia, supra, in the Georgia Supreme Court below.[17] The issue there, very

[17] It was for this very reason that the Atlanta, Georgia, law enforcement effort in 1971 was pointed in the direction of the civil remedy and the forfeiture penalty, rather than at the criminal sanctions. (See page 11, supra) Compare the opinion of the Georgia Supreme Court in the "I Am Curious (Yellow)" case, Evans Theater Corp. v. Slaton, 227 Ga. 377, 180 S.E.2d 712, Mar. 4, 1971. In the criminal area, one is inclined to confuse the issues by reasoning along "dominant theme" lines, which assumes, erroneously, that the proscribed sexual conduct, which is specifically defined is acceptable so long as it is an "integrated" part of the theme. Amicus submits that the correct rule of law was stated in Trans-Lux Distributing Corp. v. Board of Regents, 248 NYS 2d 857 (Mar. 26, 1964):

> "If simulated sexual intercourse outrages public decency, it does so as such and not only when the sole or dominant subject of any given exhibition." Only when this misapprehension is corrected by a directive from this Court, will it be possible for law enforcement to assure that films like "Deep Throat" will have a very short run.

simply, would have been "Is the artist such a favorite of the law that, in plying his craft, he may exhibit to a public audience on an enlarged motion picture screen for public entertainment, an acted-out version of simulated oral sodomy, engaged in by "beautiful" Hollywood actors to the accompaniment of pleasant surroundings and inviting musical sounds? – in the face of an overriding public policy to the contrary, clearly articulated [18] by all three elements of government (See "Statutory Background" at Points A, 2, 3, and 4, supra at pages 10-15).

Certainly the problem is more easily understood where the only issue is "May the State enjoin such live conduct?" or, may the state enjoin such filmed portrayals of explicit "sexual conduct?" or, "May the State declare a forfeiture of the property interest in the product which embodies the lewd portrayals" or, "May the state declare a forfeiture of the profits from the commercial public exhibitions of such subject matter?" It seems to Amicus that, on this fundamental issue, Associate Judge Burke of the New York Court of Appeals was

[18] In the light of subsequent events (i.e., the chaotic retreat of Justice Brennan in Paris Adult Theatre I v. Slaton, 413 US 49, 37 L.Ed.2d 446, at 467-491, 93 S Ct 2628 (June 21, 1973) was not Justice Brennan (in voting to override the "articulated" public policy of the States of Florida and Massachusetts) one of the principal actors in a "reverse" censorship movement in Grove Press, Inc. v Gerstein, 378 US 577, 12 L.Ed2d 1035, 84 S Ct 1909 (June 22, 1964) and Memoirs of a Woman of Pleasure v. Attorney General of Massachusetts, 383 US 413, 415, 16 L.Ed.2d 1, 3, 86 S Ct 975 (Mar. 21, 1966)? Compare Justice White's position in his dissent in Grove Press, Inc., v. Gerstein, supra, and in Memoirs, supra, at 461:

> "Nor does it mean that if books, like Fanny Hill are unprotected, their non prurient appeal is necessarily lost to the world. Literary style, history, teachings about sex, character description (even of a prostitute) or moral lessons need not come wrapped in such packages. The fact that they do impeaches their claims to immunity from legislative censure. . . ."
>
> "Finally, it should be remembered that if the publication and sale of Fanny Hill and like books are proscribed, it is not the the Constitution that imposes the ban. Censure stems from a legislative act, and legislatures are constitutionally free to embrace such books whenever they wish to do so. But if a State insists on treating Fanny Hill as obscene and forbidding its sale, the First Amendment does not prevent it from doing so. . . ."
>
> "I would affirm the judgment below." (Our emphasis.)

plainly correct when he stated in his majority opinion in *Trans Lux Distributing Corp. v. Board of Regents*, supra, at 863:

> "To all argument predicated on artistic merit as decisive of the constitutional question, it is sufficient answer to say that artists are not such favorites of the law that they may ply their craft in the teeth of a declared overriding public policy against pornographic displays. Since no other profession is priviledged to bend morals, policy and law to its internal craft standards, then neither should producers of films."

Where civil sanctions are being "fair notice" is not an issue. A final and complete resolution of the civil lawsuit does not depend upon the litigatious issue as to whether "sexual conduct" is "specifically defined" by applicable state law, *Miller v. California*, 413 US 15, 37 L.Ed.2 419, 431, 93 S.Ct. 2607. Since the Court's injunction is prospective in nature, no "expost facto" side issue is presented. See *State of Ohio ex rel Keating v. A Motion Picture Film Entitled Vixen*, 272 N.E.2d 137, 141, 27 Ohio St.2d 278 (July 21, 1971) as adhered to on remand in *State ex rel Keating v. Vixen*, 37 Ohio St.2d 215, 301 N.E.2d 880, (Sept. 26, 1973):

> "Since the real issue before this Court is whether the injunction should be dissolved, or combined in force and effect, RC § § 2905.34 and 2905.35 are applicable at this time notwithstanding their enactment postdates the injunction granted below. . .
>
> It follows that we have authority to render such judgment as the Ohio Court would now be required to render, if the cause were remanded. Such authority is specifically given in Section 2(B) (1) (f), Art. IV Ohio Constitution."

In Amicus' view the authorities which have considered the civil issue, as thus isolated, have made a resolution of that single issue quite simple. Those authorities start with Justice Tom Clark concurring in *Kingsley International Pictures Corp. v. Regents*, 360 US 684, 702, 3 L.Ed2, 1512, 1524, 79 S.Ct. 1362 (June 29, 1959):

"It may be, as Chief Judge Conway said, "that our public morality, possibly more than ever before, needs every protection government can give." 4 N.Y.S.2d at 363, 151 N.E.2d 204, 205, 175 N.Y.S.2d at 50. And, as my Brother Harlan points out, "each time such a statute is struck down, the State is left in more confusion." This is true where broad grounds are employed leaving no indication as to what may be necessary to meet the requirement of due process. *I see no grounds for confusion, however, were a statute to ban "pornographic" films, or those that "portray acts of sexual immorality, perversion, or lewdness."* (Our emphasis)

See also Justice Burke speaking in *Trans Lux Distributing Corp. V. Board of Regents*, 248 N.Y.S.2d 857, 858-864 (Mar. 15, 1965):

"If simulated sexual intercourse outrages public decency, it does so as such and not only when the sole or dominant subject of any given exhibition. The licensing statute contemplates the deletion of such material. It may either be omitted entirely or the producer may redo the scene another way. *If it is objected that the enterprise is artistically not worth doing without the scene as it stands, this is the problem not of the law, but of the producer who has made a pornographic scene so central to his work. . .*" (Our emphasis)

The Per Curian opinion of the Ohio Supreme Court voiced the same sentiment in *State of Ohio ex rel Keating v. "Vixen"*, 27 Ohio St.2d 278, 272 N.E.2 137 at 140 (July 21, 1971) as adhered to on remand in *State of Ohio ex rel Keating v. "Vixen"*, 37 Ohio St.2d 215, 301 N.E.2d 888, (Sept. 26, 1973):

"Assume, hypothetically, that the main character in "The Sound of Music" performs, during one scene, an act of sexual lewdness, could we permit that part of the film to go unregulated merely because the producer had an "eye on the recent Supreme Court ruling?" The question supplies its own answer. . ."

"Neither the First Amendment of the United States Constitution nor the Ohio Constitution will be construed as inhibiting the General Assembly from proscribing the commercial exploitation of a purported act of sexual intercourse. . . "(Our emphasis)

That is exactly the conclusion reached by the Georgia Supreme Court on the civil aspect of this philosophical controversy. See *Evans Theatre Corp. v. Slaton*, 227 Ga 377, 180 S.E.2d 712, where the Georgia Supreme Court held at page 715:

"The Criminal Code of Georgia makes penal a lewd performance in public, including an act of sexual intercourse and a lewd appearance in a state of nudity. Code Ann. § 26-2011 (Ga.L.1968, pp. 1249, 1301). Such acts are prohibited, not because of the injury inflicted on other individuals, as in the case of murder or robbery, but because the acts are offensive to the majority of the people. If any semblance of civilization is retained in our country, the States must have standards of conduct permissible in public. *There is little difference in the effect on the public between lewd conduct in public areas and lewd conduct explicitly performed on a motion picture screen for the viewing of the public.* (Our emphasis)

Appendix B

P. B. I. C., INC. et al.

v.

DISTRICT ATTORNEY OF SUFFOLK COUNTY.

Supreme Judicial Court of Massachusetts, Suffolk.

Argued March 27, 1970.

Decided April 9, 1970.

Injunctive relief was sought against prosecution. The case was reserved and reported without decision by the Supreme Judicial Court for the County of Suffolk, Cutter, J. The Supreme Judicial Court held that injunctive relief was given against prosecution of producers and members of cast of musical play for violation of statute relating to open and gross lewdness and statute relating to obscene entertainments conditioned on excision forthwith of specified lewd features including requirement that each member of cast be clothed to a reasonable extent at all times and the complete elimination of all simulation of sexual intercourse or deviation.

Ordered accordingly.

1. Injunction ⇐85(2), 105(1)

Discretionary equitable jurisdiction exists to restrain enforcement of an unconstitutional criminal statute or unconstitutional application of a valid statute.

2. Injunction ⇐189

Injunctive relief against prosecution of producers and members of cast of musical play for violation of statute relating to open and gross lewdness and statute relating to obscene entertainments was given conditioned on excision forthwith of specified lewd features including requirement that each member of cast be clothed to a reasonable extent at all times and the complete elimination of all simulation of sexual intercourse or deviation. M.G.L.A. c. 272 §§ 16, 32.

Gerald A. Berlin, Harold Katz, Henry P. Monaghan, Boston, and Alan M. Dershowitz, Cambridge, for P. B. I. C., Inc.

Gael Mahony and Richard C. Minzner, Boston, for the Trustees of the Jujamcyn Theatres and another.

Garrett H. Byrne, Dist. Atty., Joseph R. Nolan, Asst. Dist. Atty., Alvin Brody and John M. Lynch, III, Boston, for respondent.

Before WILKINS, C. J., and SPALDING, CUTTER, REARDON and QUIRICO, JJ.

RESCRIPT.

[1, 2] In this case, reserved and reported without decision by a single justice, injunctive relief is sought against prosecution of the producers and members of the cast of a performance called "Hair," for violation of G.L. c. 272 §§ 16 and 32. Declaration is sought that prosecution would contravene various constitutional provisions. Each justice participating has seen the performance at the request of the parties. One scene shows members of the cast in the nude facing the audience. One nude male performer is bathed on stage. There is incidental stage action which a jury could conclude was clowning intended to simulate sexual intercourse or deviation. This appears to be less realistic than the conduct discussed in People v. Bercowitz, 308 N.Y.S.2d 1 (Cr.Ct.N.Y.). The play in various respects will be offensive to some persons. It constitutes, however, in some degree, an obscure form of protest protected under the First Amendment. Viewed apart from the specific incidents mentioned above, it is not lewd and lascivious, whatever other objections there may be to it. The incidents, already mentioned are separable from, and wholly unnecessary to, whatever theme this

noisy, disorganized performance may have. Discretionary equitable jurisdiction, infrequently exercised, exists to restrain enforcement of an unconstitutional criminal statute or unconstitutional application of a valid statute. See Slome v. Chief of Police of Fitchburg, 304 Mass. 187, 188, 23 N.E.2d 133; Kenyon v. Chicopee, 320 Mass. 528, 531, 535, 70 N.E.2d 241. Reasonable doubts are asserted whether the statutes cited have application to dramatic performances (cf. Re Giannini, 69 Cal.2d 563, 570–577, 72 Cal. Rptr. 655, 446 P.2d 535), and whether, if so applied, these statutes may be unconstitutionally vague. See Alegata v. Commonwealth, 353 Mass. 287, 293, 231 N.E.2d 201. Injunctive relief will be given, but, by analogy to the principle that he who seeks equity must do equity, the injunction, to be framed in the county court, shall be conditioned upon excision forthwith of the specified lewd features so as (a) to have each member of the cast clothed to a reasonable extent at all times, and (b) to eliminate completely all simulation of sexual intercourse or deviation. Nothing in this opinion or any injunction is to preclude prosecution for any misuse of the national flag, a matter not argued to us.

So ordered.